

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1107 of 1989

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

-----

KOLI GOMIBEN SHYAMJI

Versus

KOLI LAXMAN PREMJI

-----

Appearance:

MR MANOJ N POPAT for Petitioners  
MR SURESH M SHAH for Respondent No. 1  
MR ST MEHTA Addl.PP for the State.

-----

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 15/01/97

ORAL JUDGEMENT

This petition is preferred by a divorced woman who has been denied maintenance under section 125 of the Code of Criminal Procedure.

2. Petitioner preferred Misc. Criminal Application No. 738 of 1986 under section 125 of the Code of

Criminal Procedure, 1973 before the learned Judicial Magistrate, First Class, Jamnagar claiming maintenance from her former husband - respondent No.1 herein. Petitioner was married to respondent No.1 some ten years earlier and she had given birth to a daughter during the subsistence of the said marriage. However, in view of the ill-treatment, the petitioner went to reside with her parents and the custody of the daughter was retained by respondent No.1. Respondent No.1 filed Hindu Marriage Petition No. 18 of 1979 for restitution of conjugal rights which was decreed on 16th March, 1981. In spite of the said decree, same was not complied with by the petitioner. Respondent No.1 therefore, preferred Hindu Marriage Petition No. 29 of 1983 for divorce which was granted on 3rd October, 1984. While passing the decree for divorce, civil court also ordered permanent alimony of Rs.200/- per month in favour of the petitioner. Feeling aggrieved, the respondent No.1 preferred Regular Civil Appeal No. 224 of 1984 wherein the order of permanent alimony is stayed. The petitioner, thereafter, preferred above Misc.Criminal Application for maintenance under section 125 of the Code of Criminal Procedure. The learned Magistrate, under his judgment and order dated 31st December, 1987, awarded monthly maintenance of Rs.200/- to the petitioner.

3. Feeling aggrieved, the petitioner preferred criminal revision application No. 8 of 1988 for enhancement of the maintenance awarded by the learned Magistrate and respondent No.1 preferred criminal revision application No.1 of 1988 against the maintenance awarded by the learned Magistrate in the Court of the learned Joint District and Sessions Judge, Jamnagar.

4. Criminal Revision Application No. 8 of 1988 preferred by the petitioner was dismissed by the learned Joint District & Sessions Judge, Jamnagar. Criminal Revision Application No.1 of 1988 preferred by respondent No.1 herein was allowed. While considering the aforesaid revision applications, the sessions Court took into consideration decree for restitution of conjugal rights passed by the civil court in favour of respondent No.1 herein which was not complied with by the petitioner. The Court came to the conclusion that since the decree for conjugal rights was passed in favour of respondent No.1-husband, it presupposes that the petitioner had no justifiable reason not to live with her husband. Since there was no justifiable reason for the petitioner to stay separate from her husband, she was not entitled to maintenance as prayed for by her.

5. Feeling aggrieved, the petitioner has preferred this petition before this Court under Article 227 of the Constitution of India. Learned advocate Mr. Popat has appeared for the petitioner and has contended that the petitioner being a divorced woman, is entitled to maintenance from her former husband - respondent No.1 herein. The petitioner having been divorced under the decree passed by the Civil Court, decree for restitution of conjugal rights loses its significance and the maintenance could not have been denied to the petitioner on the basis of the decree for restitution of conjugal rights passed in favour of the respondent No.1. In support of his contention, he has relied upon the judgment of the Hon'ble Supreme Court in the matter of Bai Tahira v. Ali Hussain Fissali Chothia and another, [AIR 1979 SC pg. 362 ]. The Court has held that; "every divorced wife, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of marriage makes no difference to this right under the current Code." He has also relied upon the judgment of Punjab & Haryana High Court in the matter of Darshan Pal v. Smt. Darshna, [1986 CRI.L.J.48]. The Court has taken a view that; " decree for divorce puts an end to the marital tie and she is no longer bound to join her ex-husband. Therefore, it is not open to him to plead that since she did not comply with an earlier decree for restitution of conjugal rights and since he was even after the decree for divorce willing to keep her, she is not entitled to maintenance." Mr. Popat has also relied upon the judgment of the Madhya Pradesh High Court in the matter of Babulal v. Sunita, [1987 CRI.L.J.525]. The Court has taken a view that, "the wife's application for maintenance under section 125 of the Code of Criminal Procedure cannot be rejected merely because the ex-husband has obtained decree for restitution of conjugal rights against her and she declines to comply with it. Second Proviso to section 125(3) is, in fact, intended to meet such a case and the Magistrate can decide if her refusal is justified". Thus, said Court has taken view that the Magistrate should apply his mind and decide whether the wife's refusal to cohabit with the husband is justified or not. Mr. Popat has, therefore, contended that in the present case, the lower court has without application of mind, rejected the application of the petitioner and has not considered factum of divorce which has become effective since October, 1984. After the divorce, there was no question of the petitioner's residing with respondent No.1. He has, therefore, submitted that the petitioner was entitled to maintenance from her former husband.

6. The petition is opposed by learned advocate Mr. Shah appearing for respondent No.1. He has submitted that the moment decree for restitution of conjugal rights is passed, it presupposes that the wife had no justifiable reason to refuse to stay with her husband and in case of such refusal, the wife would not be entitled to maintenance under sec.125 of the Code. He has further submitted that the petitioner has already been awarded monthly maintenance of Rs.200/- by way of permanent alimony by the Civil Court while passing decree for divorce. In view of the said maintenance allowed by the Civil Court, no further maintenance was required to be given by granting maintenance under section 125 of the Code of Criminal Procedure. He has also submitted that the factum of permanent alimony allowed by the civil court was not referred to by the petitioner in her application and, thus, she had suppressed material fact from the Court. She also made a false statement in course of her deposition to the effect that no decree for restitution of conjugal rights was passed against her and that she was not divorced from respondent No.1. Mr. Shah has, therefore, submitted that in view of this suppression of material facts and false evidence on oath also, her application for maintenance requires to be rejected. He has also relied upon the judgments of this court in the matters of Girishbhai Babubhai Raja v. Smt. Hansaben Girishchandra and Anr., [1986 GLH pg.778]; and Harish Mansukhlal v. Hansagauri Ramshankar and Anr. [1981 GLR 1223]. Both the Courts have taken a view that if the wife does not obey decree for restitution of conjugal rights, she is not entitled to maintenance under sec.125 of the Code of Criminal Procedure. He has also relied upon the judgment of this Court in the matter of Dr. Rameshchandra Yadav v. Dhirajgauri and Anr. [1982 GLH pg.899]. In the said matter, the Court was considering simultaneous applications made by the estranged wife for interim maintenance under section 24 of the Hindu Marriage Act and for maintenance under sec.125 of the Code of Criminal Procedure. The Court rejected the contention that once the wife had applied for interim alimony under sec.24 of the Hindu Marriage Act, she could not have filed proceedings under section 125 of the Code. But, considering that the simultaneous applications preferred by the wife, husband maybe burdened with the double amount of maintenance which might be fixed in both of the independent proceedings. Considering this apprehension, the Court directed that the application for interim alimony under sec.24 of the Hindu Marriage Act if decided earlier, interim alimony ordered to be paid by the husband to the wife may be

taken into consideration by the Magistrate while granting maintenance under section 125 of the Code of Criminal Procedure. Mr Shah has contended that in both the proceedings namely one for restitution of conjugal rights and another for divorce filed by the husband Civil Court has held that the petitioner's (wife's) refusal to cohabit with her husband was not justified. He has submitted that the decision of the Civil Court must prevail against the like decision by a criminal Court. He has, therefore, relied upon the judgment of the Supreme Court in the matter of Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and others, [AIR 1978 SC 1807].

7. This petition is required to be allowed since the Court below has ignored decree of divorce passed by the competent civil court in favour of respondent No.1. It should be held that once decree for divorce is passed, decree for restitution of conjugal rights becomes insignificant. Even if the wife had refused to comply with the decree for restitution of conjugal rights, once divorce has become effective, she becomes entitled to maintenance under section 125 of the Code. This Court, in the matter of Girishbhai Babubhai Raja [supra] and in the matter of Harish Mansukhlal [supra] was considering a case where the decree for restitution of conjugal rights was passed in favour of the husband which was operative and the marriage was subsisting. The wife could have complied with the decree for restitution of conjugal rights and cohabited with her husband provided the marriage were subsisting. In the present case, on the date of application, the marriage was not subsisting and the petitioner could not have been expected to go and reside with her former husband. In my view, therefore, judgment of this court in the above referred two matters cannot be applied to the facts of this case. The question whether the wife had sufficient reason to refuse to lie with her husband or not would arise only if the marriage were subsisting. Provisions contained in Section 125 (4) would not be attracted in case of a claim for maintenance by a divorced woman.

8. The contention of Mr. Shah that the petitioner has suppressed material facts and has made false statements on oath and the petition, therefore, requires to be rejected also requires to be rejected. Mr. Popat has read over the application made by the petitioner under section 125 of the Code of Criminal Procedure in which it has been averred that after decree for restitution of conjugal rights was passed, decree for divorce was passed and the interim alimony of Rs.200/was

awarded by the civil court and permanent alimony of Rs.200/- was awarded by the civil court. It is also mentioned that out of the alimony awarded by the civil court, Rs.1200/- had been deposited in the Court while sum of Rs.11,800/- were still due to be paid against the permanent alimony awarded by the Court. Further, it should be noted that the petitioner is a labourer and probably illiterate one. She may not have understood the consequences of her making a statement in course of deposition and saying that no decree for conjugal rights or divorce were passed against her. I, therefore, cannot hold that the petitioner has suppressed material fact from the court or has tried to misguide the court by making false statements as averred by Mr. Shah. Further, neither the Supreme Court in the matter of Captain Ramesh Chandar Kaushal [supra] nor this Court in the matter of Dr. Rameshchandra Shantilal Yadav [supra] has held that once application for maintenance is granted by the Civil Court under the Hindu Adoption and Maintenance Act, no maintenance can be awarded under section 125 of the Code of Criminal Procedure. This Court, in the matter of Harish Mansukhlal [supra] has merely voiced caution that simultaneous applications before the civil court as well as the criminal Court may not result into double maintenance to be paid by the husband to the wife. In the present case, due care has been taken about this aspect also. The learned Magistrate has while ordering monthly maintenance of Rs.200/- taken into consideration the permanent alimony awarded by the civil court while passing decree for divorce. Considering the monthly maintenance of Rs.200/allowed by the civil court, the learned Magistrate has allowed monthly maintenance of Rs.200/- to the petitioner. In my view, the learned Magistrate has taken correct view and has made order after appreciating the evidence placed before it. There is one further reason why said order should not be interfered with. Be it noted that though permanent alimony has been awarded by the civil court while passing decree for divorce, same has been challenged by respondent No.1 in regular civil appeal no. 224 of 1984 and the order of permanent alimony has been stayed. Considering these facts also, the petitioner is required to be paid maintenance as allowed by the Magistrate. The petition is therefore allowed. The judgment and order passed by the learned Jt. District & Sessions Judge, Jamnagar in Criminal Revision Application No. 1/88 and 8/88 is hereby quashed and set aside. Order of the learned Judicial Magistrate, First Class, Jamnagar made on Misc. Criminal Application No. 738 of 1986 is restored. Respondent No.1 is directed to pay the amount of maintenance from

the date of the said application upto date within a period of six months from today. He shall also pay monthly maintenance of Rs.200/awarded by the learned Magistrate regularly every month commencing from 1st February, 1997. Rule is made absolute accordingly.

///

vyas